

“Family-Friendly Programming: Providing More Tools for Parents”

Kevin J. Martin*

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Since then-Chairman of the Federal Communications Commission Newton Minow dubbed television a “vast wasteland” in 1961, the medium has changed dramatically. Consumers today have so many programs from which to choose that the complaint is rarely a lack of high-quality television shows. Rather, the concern for many consumers is how to navigate these teeming waters. This course-plotting can be a particular challenge for parents who desire to watch television together with their children. I therefore encourage the television industry to provide these parents more navigational tools.

Consumers today have exponentially more viewing options, and they can choose from a remarkable array of programs, both on broadcast and on subscription television. They can view these programs using digital technology that produces a crisp, clear *color* picture far surpassing the fuzzy black-and-white world of 1961. Importantly, the burgeoning competition among television networks has resulted in some of the best programming ever produced. It also has enabled such diversity that niche channels, which devote 100% of their time to science, art, or history, can be successful.

Television today, however, also presents some of the coarsest programming ever aired. Parents who want to watch television together with their children too often feel that, despite the increased number of viewing choices, they have too little to watch. Prime time on broadcast television has become less family friendly. Cable and Direct Broadcast Satellite (“DBS” or “satellite”) do offer new family-oriented choices, but parents cannot subscribe to those channels alone. Rather, they must take the channels they do not want their families to view along with the Disney Channel and Discovery Channel.

I believe it is time for our culture to rethink our approach to family-friendly programming. Parents should have the tools to help their children take advantage of the *good* that television can offer. Certainly, broadcasters, cable, and satellite operators enjoy significant First Amendment rights to choose the content they deliver to our homes. But these companies can take it upon themselves to improve the tools they provide parents, so that parents are able to enjoy the diversity television today has to offer, yet still protect their children from content they believe inappropriate for family viewing.

I therefore propose two challenges to the industry: I urge broadcasters to create a “Family Viewing Hour” during the first hour of prime time. I also urge cable and satellite operators to offer a family-friendly programming package. Together, these steps would empower parents and enhance the value that television can offer.

* Commissioner, Federal Communications Commission. Commissioner Martin was nominated to be a member of the FCC by President George W. Bush on April 30, 2001, and was sworn in on July 3, 2001. Mr. Martin serves a five-year term expiring in June 2006. The Author thanks Catherine Bohigian, his legal advisor on media issues, for her assistance on the preparation of this Essay.

MARKETPLACE DEVELOPMENTS

When Chairman Minow observed a “vast wasteland,” consumers generally had three choices for television programming—ABC, NBC, and CBS—and thus these three national broadcast networks dominated the television marketplace.¹ Even with the few independent stations available in some of the larger markets, television audiences were presented with a limited amount of viewing options. Cable television, formerly known as Community Antenna Television (or CATV), was still in its infancy; by 1963, about 1 million homes subscribed to cable,² but the service was largely used to extend the reach of broadcast signals, not to offer different programming.

Over the last four decades, the television landscape has changed dramatically. Broadcast television options have grown considerably. Just since 1980, the number of full-power television stations has increased almost 70%.³ With the introduction of the Fox Television network in 1986, the collection of dominant networks—once known as the “Big Three”—became referred to as the “Big Four.” The path then was paved for the entrance of additional new networks. In January 1995, the fifth and sixth networks were born: Turner Broadcasting System launched the WB Network, and Paramount Television launched the United Paramount Network (“UPN”). These networks currently reach 88% and 97% of U.S. television homes, respectively.⁴ More recently, Paxson Communications launched PAX TV in 1998, reaching 85% of the country.⁵

The current transition to digital television now offers viewers not only more choices, but new opportunities. Broadcasters are beginning to take advantage of the many benefits digital will bring to consumers—a markedly sharper picture resolution and better sound; an astounding choice of video programming, including niche programs and movies on demand; CD-quality music channels of all genres; interactivity; sophisticated program guides; and new, innovative services.

The most remarkable development since the 1960s, however, may be the explosion in the number of television networks, made possible by the development of multi-channel video programming distributors (“MVPDs”), including cable and satellite.⁶ Today consumers can choose among more than 230 national cable networks and more than 50 regional networks—an almost unimaginable sum to a television viewer of the 1960s.⁷

1. C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 Fla. L. Rev. 839, 867 (2002).

2. *Cable History*, The Cable Center, <http://www.cablecenter.org/history/timeline/decade.cfm?start=1960> (last visited Feb. 27, 2003).

3. 2002 Biennial Reg. Review Before the FCC—Review of the Comm’n’s Brdcast. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Notice of Proposed Rulemaking*, 17 F.C.C.R. 18503, para. 53 (2002) [hereinafter 2002 Review].

4. See WB Web site, at <http://www2.warnerbros.com/web/all/link/partner.jsp?url=http://www.thewb.com> (last visited Feb. 27, 2003); Viacom Web site, at <http://www.viacom.com/thefacts.tin> (last visited Feb. 27, 2003).

5. See Pax Communications Web site, at <http://www.pax.tv/about/> (visited Feb. 27, 2003).

6. In addition to cable and satellite, MVPD technologies include home satellite dishes, wireless cable systems, and satellite master antenna television systems.

7. 2002 Review, *supra* note 3, para. 25.

In addition, the number of households accessing these multi-channel services has increased significantly since the 1960s. In 1976, there were still only 17% of U.S. households—fewer than 10 million homes—served by cable.⁸ By 2002, cable reached 96% of television viewing homes, with 73 million subscribers.⁹ DBS is available nationwide and now has nearly 19.8 million subscribers.¹⁰ Today, 85.3% of households subscribe to a MVPD.¹¹

Long gone are the days when broadcasters commanded 100% of the viewing audience. From July 2001 to June 2002, broadcast television averaged only a 53.0 audience share, while cable networks' share had increased to 58.3.¹² Other sources indicate the shift may be even more dramatic, with broadcast drawing only 37%, and cable programming drawing 53% of TV viewers.¹³ Nevertheless, the role of television broadcasters remains a significant one. Broadcast television has lost its monopoly on the viewing audience. Meanwhile, the broadcast networks, with only a handful of channels, continue to rival the cable networks for viewers, particularly during prime time, the period during which the American television audience is at its highest.¹⁴

In summary, the advances in television and the development of competing providers of video programming have resulted in unprecedented choice for consumers, particularly the vast majority that subscribe to a MVPD. Moreover, some of the best television ever produced is aired today. Yet, as discussed below, the picture is not entirely rosy. For families, the situation can be somewhat of a Catch-22. If you subscribe to a MVPD, you can get a significant selection of high-quality, family-friendly programming, but you also are forced to buy some of the most family-unfriendly programming produced for television. If you take the route of allowing only broadcast television into your home, you avoid some of the programming that may concern you the most, but your primetime viewing options as a family may be few and shrinking, and you will have missed out on the great programming that cable and satellite have to offer. As I explain below, broadcasters and MVPD operators can help parents out of this situation,

8. Florence Setzer & Jonathon Levy, Broadcast Television in a Multichannel Marketplace, *OPP Working Paper No. 26*, 6 F.C.C.R. 3996, 4008-09 (providing percentage of homes served by cable); *HBO, Inc. v. FCC*, 567 F.2d 9, 24 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (providing number of households served by cable).

9. Cable History, The Cable Center, at <http://www.cablecenter.org/history/index.cfm> (last visited Feb. 27, 2003).

10. Satellite TV Subscriber Counts, Sky Report, at http://www.skyreport.com/dth_counts.htm (last visited Feb. 27, 2003).

11. Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming, *Ninth Annual Report*, 28 Comm. Reg. (P & F) 159, para. 5 (2002) [hereinafter *Ninth Video Competition Report*].

12. *Id.* para. 24 (citing Nielsen Media Research, *Total Day 24 Hours 6 am-6 am: Total US Ratings by Viewing Source July 2000-June 2002*, Oct. 2002). "A share is the percent of all households using television during the time period that are viewing the specified station(s) or network(s). The sum of reported audience shares exceeds 100% due to simultaneous multiple set viewing." *Id.* para. 24 n.39.

13. Charlie McCollum, *Network Programs Play it Safe: Familiar Formulas—Family Comedies, Cop Dramas—Dominate; Some Shows Are Outright Remakes*, San Jose MERCURY NEWS, Sept. 15, 2002. The varying numbers may be due to the rise and fall of broadcast audience during different parts of the television season.

14. Between July 2001 and June 2002, broadcast television averaged a 59.4 audience share during prime time; cable averaged a 56.5 share. *Ninth Video Competition Report*, *supra* note 11, para. 24 (citing Nielsen Media Research, *Primetime Monday-Saturday 8-11 PM Sunday 7-11 PM: Total US Ratings by Viewing Source July 2000-June 2002*, Oct. 2002).

and I urge them to do so.

BROADCAST CHALLENGE: FAMILY VIEWING HOUR

To the dismay of many parents, the increased competition for viewership has led broadcasters to increase markedly the amount of coarse programming and decrease the family-friendly programming they provide their viewers. This shift is particularly notable during primetime viewing hours, when families are most likely to gather around the television together.

Studies have documented this unfortunate trend. A report on the 1999-2000 television season found that two out of every three shows included sexual content, an increase from about half of all shows during the 1997-1998 season.¹⁵ The subsequent report for the 2001-2002 season revealed that the amount of sexual content on television remained high, with two-thirds of all shows continuing to include some sexual content.¹⁶ Another organization reports that from the fall 1989 season to the fall 1999 season, the incidence of sexual material, coarse language, and violence during prime time increased three-fold.¹⁷

As a result, parents wanting to watch broadcast television with their children at the end of the day—when most viewers *do* still turn to broadcast television—may feel like they have fewer options, despite all the growth over the last decades. I do not dispute that parents could respond by turning the television off, but there should be a better answer. Accordingly, I challenge broadcasters to devote the first hour of prime time to family-friendly programs—programs that parents and children can enjoy together.¹⁸

The notion of a family-oriented viewing hour is not a new one. In fact, lawmakers, regulators, and members of the television industry recognized such a need almost thirty years ago. In 1974, the Federal Communications Commission (“FCC”) received nearly 25,000 complaints about violent or sexually oriented programming.¹⁹ That same year, responding in part to a finding by the Surgeon General about the adverse effects of televised violence on certain members of society,²⁰ Congress instructed the

15. KAISER FAMILY FOUND., SEX ON TV(2): A BIENNIAL REPORT TO THE KAISER FAMILY FOUNDATION 16-18 (Feb. 2001), *available at* <http://www.kff.org>.

16. KAISER FAMILY FOUND., SEX ON TELEVISION 3: CONTENT AND CONTEXT, BIENNIAL REPORT OF THE KAISER FAMILY FOUNDATION 14 (Feb. 2003).

17. Press Release, Parents Television Council, What a Difference a Decade Makes: A Comparison of Prime Time Sex, Language, and Violence in 1989 and '99 (Mar. 30, 2000), *available at* <http://www.parentstv.org/PTC/publications/release/2000/pr033000.asp>.

18. The Family Friendly Programming Forum, a group of more than 40 major national advertisers, defines family-friendly programs as those which are “relevant and interesting to a broad audience; contain no elements that the average viewer would find offensive or that the average parent is embarrassed to see with children in the room, and ideally embody an uplifting message.” Family Friendly Programming Forum Web site, Questions/Answers, *at* <http://www.ana.net/family/default.htm> (last visited Feb. 27, 2003).

19. Report on the Brdcast. of Violent, Indecent, and Obscene Material, *Report*, 51 F.C.C.2d 418, 419, 32 Rad. Reg.2d (P & F) 1367 (1975) [hereinafter *Report*]; *Writers Guild of Am. v. ABC*, 609 F.2d 355, 359 (9th Cir. 1979).

20. *See generally Surgeon General's Report by the Scientific Advisory Committee on Television and Social Behavior: Hearing Before the Senate Comm. on Commerce, Subcomm. on Communications*, 92d Cong., 2d Sess. (1972).

FCC to outline actions it had taken or planned to take to protect children from excessive violence and obscenity.²¹ The FCC staff recommended several options, including issuing notices of inquiry, notices of proposed rulemaking, and policy statements.²² Then-Chairman Wiley, concerned that such formal measures by the FCC could pose significant First Amendment concerns, opted instead to encourage industry representatives to take voluntary actions to regulate the amount of violent or sexually oriented content that aired during those hours when children normally watch television.²³

In April 1975, the National Association of Broadcasters (“NAB”) responded to the growing concern about television content by announcing a family viewing policy, which it incorporated into the NAB Code of Conduct for Television.²⁴ The family viewing amendment provided in relevant part that “entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour.”²⁵

In 1983, the Department of Justice brought suit against the NAB, challenging the

21. H.R. REP. NO. 93-1139, 93d Cong., 2d Sess. 15 (1974); S. REP. NO. 93-1056, at 19 (1974) (these two reports were issued during congressional debates on the appropriations legislation for Fiscal Year 1975, Pub. L. No. 93-414).

22. *Writers Guild of Am.*, 609 F.2d at 359.

23. *Id.*

24. The Writers Guild of America brought an action against the major networks and the FCC challenging the validity of the family viewing policy. *Writers Guild of Am. v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976). Although the District Court found that the FCC (through the statements of the Chairman) had violated the First Amendment and the Administrative Procedure Act (“APA”), the Ninth Circuit Court vacated this judgment on jurisdictional grounds and remanded the case back to the FCC. *Writers Guild of Am.*, 609 F.2d at 356. Although the appellate court did not rule on the First Amendment issue, language from the holding suggests that even an FCC-mandated family viewing hour might be constitutionally permissible:

It simply is not true that the First Amendment bars *all* limitations of the power of the individual licensee to determine what he will transmit to the listening and viewing public. At issue in this case is whether a family viewing hour imposed by the FCC would contravene the First Amendment. This is a considerably more narrow and precise issue than is the district court’s bedrock principle and with respect to which the FCC’s expertise and procedures could provide enormous assistance to the judiciary.

Id. at 364. On remand, the FCC concluded that the NAB freely and voluntarily had chosen to adopt the family viewing policy as part of its code, and therefore the informal FCC action did not violate the First Amendment or the APA. Primary Jurisdiction Referral of Claims Against Gov’t Defendant Arising from the Inclusion in the NAB TV Code of the “Family Viewing Policy,” *Report*, 95 F.C.C.2d 700 (1983). This ruling was not challenged.

25. *Writers Guild of Am.*, 609 F.2d at 358 n.2. The amendment continued:

In the occasional case when an entertainment program in this time period is deemed to be inappropriate for such an audience, advisories should be used to alert viewers. Advisories should also be used when programs in later prime time periods contain material that might be disturbing to significant segments of the audience.

These advisories should be presented in audio and video form at the beginning of the program and when deemed appropriate at a later point in the program. Advisories should also be used responsibly in promotional material in advance of the program. When using an advisory, the broadcaster should attempt to notify publishers of television program listings.

Special care should be taken with respect to the content and treatment of audience advisories so that they do not disserve their intended purpose by containing material that is promotional, sensational or exploitative. Promotional announcements for programs that include advisories should be scheduled on a basis consistent with the purpose of the advisory.

Writers Guild of Am., 609 F.2d at 358 n.2.

NAB Code on antitrust grounds.²⁶ Although the suit involved only the code's restrictions on television commercials,²⁷ the NAB Board of Directors ultimately cancelled the Code of Conduct in its entirety, eliminating all regulations—even those not addressed by the suit, such as those dealing with violent, indecent, and sexually explicit content. The requirements for a family viewing hour were thereby rescinded.

Recently, there have been efforts to reinstitute family viewing policies. In 2001, twenty-eight members of Congress signed a letter to the presidents of the major television broadcast networks asking them to voluntarily restore the Family Hour.²⁸ That same year, Senator Brownback introduced a bill whose express purpose was to “permit the entertainment industry . . . to develop a set of voluntary programming guidelines similar to those contained in the Television Code of the National Association of Broadcasters.”²⁹

Advertisers also are taking steps to encourage the development of family-friendly programming. A group of more than forty major national advertisers, working through the Association of National Advertisers, have formed the Family Friendly Programming Forum to address two concerns: “the dwindling availability of family friendly television programs during prime viewing hours”; and “the TV imagery, role models, themes and language to which our young people are exposed.”³⁰ The Forum has begun a concerted effort to encourage the entertainment community to provide “more movies, series, documentaries and informational programs, aired between 8:00 and 10:00 P.M., that are relevant and interesting to a broad audience and that parents would enjoy viewing together with a child.”³¹ This effort includes a script development fund—in which CBS, ABC, NBC, and WB participate—to finance new family-friendly television scripts, a scholarship program for students who work on family-friendly projects, and the Annual Family Television Awards to recognize outstanding family television. I applaud the work the Forum is doing, and I congratulate the winners of the most recent awards, as well as the networks that aired the shows: CBS (three awards), WB (two awards), ABC (two awards), and PBS (one award).³²

Even more promising, ABC appears to be embracing the idea of the family viewing hour. This year it launched its “happy-hour” strategy, in which the network airs family-friendly programs from 8 P.M. to 9 P.M., in an attempt to capture a broad family audience. The reception thus far has been positive, as the network has rebounded from a 23% drop in viewership last season.³³

In sum, I believe a voluntary commitment by broadcasters to devote the first hour of prime time to family-friendly programming will be good for families (and, one might think, good for business, as well). I urge broadcasters to join this endeavor and collectively create at least one hour, five days a week, when a family can turn to

26. *United States v. NAB*, 536 F. Supp. 149 (D.D.C. 1982).

27. *Id.*

28. Press Release, Office of Representative Chris Smith, Smith Rallies Congressional Backing for Family Friendly TV Programming (Oct. 5, 2001), available at <http://www.house.gov/chris-smith/press2001/pr1005001tvfamilyhour.html>.

29. Children's Protection Act of 2001, S. 124, 107th Cong. § 3(a) (2001).

30. Family Friendly Programming Forum Web site, FFP Mission, at <http://familyprogramawards.com> (last visited Feb. 27, 2003).

31. *Id.*

32. *Id.* at Family TV Awards.

33. Associated Press, *ABC Gets a Feliz Navidad*, *NEWSDAY*, Dec. 11, 2002, at B31.

broadcast television with comfort, confidence, and enthusiasm.

CABLE AND SATELLITE CHALLENGE: FAMILY-FRIENDLY PROGRAMMING PACKAGE

Broadcast, however, cannot be the end of the story. In a world in which more than 85% of homes receive their television programming through pay-TV, programming from these distributors clearly has become pervasive. I believe cable and satellite, too, must rethink their level of responsibility to the viewing public.

Certainly, cable and satellite operators carry a significant amount of family-friendly programming. In fact, these providers offer parents more options than ever before, such as Disney Channel, Nickelodeon, ABC Family, Discovery Channel, The History Channel, and Hallmark Channel. Thus, at all hours of the day, households that subscribe to these services should be able to find programming that is suitable for parents and children alike.

Unfortunately, that does not mean that subscription to a pay-TV service is the complete solution. Because of the practice of “packaging” channels, when a parent purchases these services, that parent necessarily buys a number of channels that are not intended for children.

The advent of technological tools that could block objectionable content was hailed as a potential panacea to this problem. The V-chip (“violence” chip), introduced in 1999, allows parents to use a rating system to block a significant set of programs with violent or sexual content. Since January 2000, the V-chip has been included in all new television sets larger than 13 inches. To date, however, the V-chip has not been as effective as its supporters had hoped. Recent studies have shown that few parents know about the V-chip, and far fewer have figured out how to make it work. Although more than 40% of American parents now own a television equipped with a V-chip, less than 7% of those parents use it to block programs with violent or sexual content.³⁴ Thus, while the V-chip ultimately may prove to be an effective long-term solution, it currently is not serving as an effective tool for parents.

Digital cable and satellite systems offer another tool for parents to protect their children from certain content. Most providers employ technology that enables a parent to limit access to whole channels through use of a password. Fortunately, this function appears to be easier to use than the V-chip. The number of digital cable and satellite subscribers, however, is still relatively small. As a result, it is still too soon to know whether most parents will actually learn about this technology, whether they will use it, or whether it will be circumvented too easily.

Accordingly, many parents today still may have concerns about purchasing cable or satellite services. While most still choose to subscribe, they nevertheless remain concerned about much of the immediately accessible content. I therefore believe cable

34. News Release, Kaiser Family Foundation, Few Parents Use V-chip to Block TV Sex and Violence, but More Than Half Use TV Ratings to Pick What Kids Can Watch (July 24, 2001), *available at* <http://www.kff.org/content/2001/3158/V-Chip%20release.htm>.

and satellite operators would provide a valuable service to American families if they would offer an exclusively family-friendly programming package as an alternative to the “expanded basic” on cable, or the initial tier on DBS.³⁵ Existing family-oriented premium channels could be offered as well, either as part of the package or as an additional purchase. As a result, subscribers who are interested only in programming that they can enjoy with their family would finally have a way to purchase only that programming. Other subscribers, meanwhile, could continue to have the same options they have today.

The availability of a family-friendly package would enable parents to enjoy the increased options and high-quality programming available through cable or satellite without being required to purchase programming less suitable for children. I believe it would provide a better tool to parents to enable them to enjoy excellent programming options, yet it should not require significant change to existing cable or satellite practices or regulatory intervention.

Alternatively, cable and DBS operators might choose to offer relevant programming networks in a more a la carte manner. They could permit parents to request not to receive certain programming that is sold as part of a package, and reduce the package price accordingly. Under this second option as well, parents would be able to receive (and pay for) only that programming that they are comfortable bringing into their home.

Under either of these two approaches, cable and DBS operators would be empowering all parents—enabling them to bring multi-channel video into their home without worrying about the channels their children might fall upon while “channel surfing.” I believe such a tool would be a significant benefit to parents, and I therefore encourage cable or satellite providers to take up this challenge.

CONCLUSION

Over the last four decades, television has developed into a vastly expanded medium, with more choice and excellent content. Certainly, viewers are better off today. The viewing picture nevertheless leaves something to be desired by parents who seek family-friendly programming. Broadcasters and MVPDs can change this picture, and I encourage them to provide parents with more options and better tools to find such programming. We all will benefit.

35. The existing package or “tier” could remain the same; the operator could merely select certain family-friendly channels from the existing tier and *also* offer them as a standalone “family-friendly” alternative package. An analogy could be made to the way cable operators package the broadcast channels as part of “basic” package as well as the “expanded basic” package.